H. A. GOMEZ v. GOVERNMENT OF MALAYSIA

[O.C.J. (Harun J.) May 18, 1975, August 16, 1977]
[Kuala Lumpur — Civil Suit No. 1624 of 1967]

Employment — Wrongful dismissal — Claim of — Temporary clerk of works — Dismissal of, by State Engineer — Plaintiff appointed by Public Services Commission — Dismissal effected by authority subordinate to that which had appointed him — Whether void — Federal Constitution, Art. 135(1) and (2).

Administrative Law — Wrongful dismissal — Claim of — Temporary nature of work — Termination as distinguished from dismissal — Federal Constitution, Art. 135(1) & (2).

The plaintiff was appointed temporary clerk of works by the Public Service Commission. His services as such were terminated by the State Engineer. The plaintiff claimed that the termination of his services was void by reason of article 135(1) and (2) of the Federal Constitution as it was made by an authority subordinate to that which appointed him as clerk of works and which had no authority to appoint or terminate his services.

Held: the plaintiff was not dismissed from service and article 135 of the Federal Constitution did not apply to this case. Hence, it does not matter if the authority which terminated the service was subordinate to the Public Service Commission so long as that authority did so on behalf of the government.

Cases referred to:-

(1) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 155.

(2) *Gnanasundram* v. *Public Services Commission* [1966] 1 M.L.J. 157.

(3) *Haji Ariffin* v. *Government of Pahang* [1969] 1 M.L.J. 6.

(4) *Government of Malaysia* v. *Lionel* [1974] 1 M.L.J. 3.

CIVIL SUIT.

Morris Edgar for the plaintiff.

Abu Talib bin Othman (Senior Federal Counsel) for the defendant.

Harun J.: In this case the plaintiff claims—

"(i) A declaration that the termination of his services as temporary clerk of works purported to be effected by the Jurutera Negeri, Jabatan Kerja Raya, Johore on November 20, 1966, is void, of no effect, inoperative and that he still is a temporary clerk of works of the defendant and;

(ii) An Order that the defendant do pay to the said plaintiff all arrears of pay, allowances, and other emoluments due or owing to him as a temporary clerk of works of the defendant from the date of the purported termination of services;

(ii)(a) An Account of what is due to the plaintiff from the defendant in respect of his salary and all other emoluments as a temporary clerk of works of the defendant and an Order for payment by the defendant to the plaintiff of any sum due upon taking such Account, and

(iii) Costs.

(iv) Such further and other relief as the Honourable Court may deem fit and just."

The facts are as follows: By letter dated June 16, 1964 the Public Services Commission offered Plaintiff employment as a Temporary Clerk of Works on a salary of $580/- per mensem in the scale $324×14 — 352/419×14 — 545/562×18 — 652 in addition to a Cost of Living Allowance (COLA) at current rates. The offer is subject to certain conditions three of which are relevant to the issues raised here. The English translation of these conditions read:

"2(c) Your services would be terminable at any time with one month's notice, or one month's salary plus cost of living allowance and without any reason being given during the first year of the period of your service. You would also be free to relinquish your appointment by giving one month's notice or one month's salary plus Cost of Living Allowance. During the rest of your service, the appropriate notice required for both parties would be three months or one month's salary plus Cost of Living Allowance.

2(d) That you are at all times subject to Government General Orders, Circulars and other administrative instructions as may from time to time be issued relating to the work, conduct and conditions of service of officers in the Public Service.

3. The appointment offered is a temporary appointment on a month-to-month basis."

On July 1, 1964 the plaintiff accepted the appointment in writing subject to the conditions contained in the letter of June 16, 1964 and commenced work on the same day.

On November 19, 1966 when plaintiff was on leave he was called to the office of the State Engineer, Johor and handed a letter dated November 19, 1966 and signed by the State Engineer, Johor. The contents of the letter are:

"TERMINATION OF SERVICE

Please note that your service with this Department is terminated w.e.f November 20, 1966.

2. I attach herewith the following:—

(i) Cheque No. 094011 dated November 17, 1966 for $556.06. This amount is for 19 days (November 1, 1966 to Novem- 19, 1966) Salary, Cost of Living Allowance and Housing Allowance;

(ii) Cheque No. 094012 dated November 17, 1966 for $758.00. This amount is for one month's salary and Cost of Living Allowance in lieu of 3 months' notice of termination of service.

3. The above action is taken under paragraph 2(c) of the Letter of Appointment issued to you

4. I also attach herewith a Cheque No. 094034 dated November 17, 1966 for $312.00. This amount is for:—

(a) Arrears of Increment for period July 1, 1966 to September 30, 1966:	$ 72.00	
(b) Arrears of Housing Allowance for period August 1, 1966 to September 30, 1966:	240.00	$312.00

5. Please acknowledge receipt.

Sgd. Abdul Hamid bin Dato Ahmad
Jurutera Negri
J.K.K. Johor."

The Deputy State Engineer gave evidence to the effect that prior to the letter of November 19, the State Engineer, Johor had written to the Director of the Public Works Department, Malay States Kuala Lumpur, stating that plaintiff was redundant and that his services should be terminated. It was the Director who decided to terminate plaintiff's services.

The plaintiff accepted the payments and ceased work. By letter dated November 28, 1966 he appealed to the Director of Public Works, Kuala Lumpur for re-consideration and reinstatement. He received no reply. By letter dated December 26, 1966 he then appealed to the Public Services Commission. He received no reply. By letter dated May 15, 1967 the plaintiff's solicitors wrote to the Secretary, Public Services Commission pointing out *inter alia:*

(a) That the plaintiff was appointed by the Public Services Commission but was summarily dismissed by the State Engineer, Johor and not by the Public Services Commission;

(b) That the dismissal was effected by an authority subordinate to that which at the time of his dismissal had power to appoint him contrary to the provisions of the Constitution; and

(c) In addition it was effected without his being given a reasonable opportunity of being heard; again being contrary to the provisions of the Constitution and to rules of natural justice.

By letter dated May 18, 1967 the Secretary of the Public Services Commission replied to the plaintiff's solicitors that the plaintiff "was not dismissed, but was terminated from his service in accordance with the terms of his appointment. Therefore, the question of Article 135 of the Constitution of Malaysia, regarding dismissal from service, does not arise."

On November 15, 1967 the plaintiff commenced these proceedings. In paragraph 3 of his statement of claim the plaintiff contends that the purported termination of his services is void, inoperative and of no effect for the following reasons:

(a) The said purported termination of services was effected by an authority subordinate to that which appointed the plaintiff as Clerk of Works;

(b) The said purported termination of services was effected by an authority which at the time of the termination of services and at the time of the plaintiff's appointment as Clerk of Works had no authority to appoint or terminate the plaintiff services as Clerk of Works;

(c) The said purported termination of services was effected by an authority other than the authority which appointed the plaintiff as Clerk of Works.

It is not disputed that the plaintiff was appointed by the Public Services Commission but his services were terminated by the State Engineer, Johor. It is also not disputed that the termination was with immediate effect and that the plaintiff was not given a reasonable opportunity of being heard. It is argued that a termination under these circumstances is void by reason of Article 135(1) and (2) of the Constitution. The relevant parts of that Article are:

"135.(1) No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

It was held by the Federal Court in *Government of Malaysia* v. *Mahan Singh*[1] that Article 135 only applied to cases of dismissal or reduction in rank. The question then was the plaintiff here dismissed. He says that the circumstances of the termination of service were such that they amounted to instant dismissal. The Federal Court in *Mahan Singh's Case* drew a distinction between dismissal from service and termination of service and held that dismissal from service flowed from some form of disciplinary action. It was not alleged here that the termination of service was consequent upon disciplinary action against the plaintiff. Indeed the State Engineer clearly stated in his letter that the termination of service was in accordance with paragraph 2(c) of the plaintiff's Letter of Appointment issued by the Public Services Commission. I find it as a fact that the plaintiff was not dismissed from service and on binding authority I hold that Article 135 of the Constitution does not apply to this case. In the event it does not matter if the authority which terminated the service was subordinate to the Public Services Commission so long as that authority (The State Engineer) did so on behalf of the Government (employer).

Public service appointments are classified as either permanent or temporary (General Order 2 Cap. A), the distinction arising from the nature of the service performed. Thus the appointments of revenue collectors are permanent because for so long as Government exists revenues must be collected. The same, however, is not true of construction projects like roads, bridges and buildings. Once the job is done there will be no work for persons employed on such projects to justify them being kept on the public payroll. Hence the creation of temporary appointments such as that held by the plaintiff. It is important to bear in mind this distinction because the procedure for termination of service of public servants holding permanent appointments are made in accordance with General Orders 37 to 40 of Cap. D whereas that of public servants holding temporary appointments are made in accordance with General Orders 32 to 36 of Cap. D. Condition 2(c) of plaintiff's Letter of Appointment is in fact a reproduction of General Order 36 Cap. D and Condition 2(d) drew his attention to the applicability of General Orders to plaintiff as provided in General Order 1 Cap. D. There is abundant authority that temporary public servants are bound by their contracts of employment: see *Gnanasundram* v. *Public Services Commission*;[2] *Haji Ariffin* v. *Government of Pahang*;[3] and *Government of Malaysia* v. *Lionel*.[4] Here clause 3 clearly states that the appointment is *temporary* and clause 2(c) further states that plaintiff's services would be *terminable at any* time with notice or salary in lieu and *without any reason being given*. The plaintiff was also free to do likewise. He accepted these conditions on July 1, 1964 and is therefore bound by them. I accordingly hold that plaintiff's services were terminated in accordance with the terms of his employment.

There is, however, one other aspect of the matter and that is that employment was on a month-to-month basis. It was argued that —

(a) as his services were terminated November 19, 1966 and not on December 1 the termination was therefore wrongful dismissal;

(b) in any event he was entitled to a full month's work or salary in lieu.

In my view there is no merit to the first argument as the plaintiff's service was terminable *at any time*. It will be noted that there are two ways of terminating the employment by either side:

(i) by paying one month's salary in lieu of notice; or

(ii) by giving three months' notice.

If Conditions 2(c) and 3 are read together, it means that service can be terminated at any time *on payment* of one month's salary in lieu of notice. In such a case, the date of termination is irrelevant. There was nothing in the agreement for instance to stop the plaintiff leaving one month's salary with the State Engineer on any day and walking out of his job. The State Engineer could not have compelled the plaintiff to work for the rest of that month.

Counsel for the defendant was quite prepared to concede that if at all, the plaintiff was entitled to balance of salary for the month of November, namely the period that he had not worked. I do not agree. The month-to-month basis if it means anything at all when the letter of appointment is read as whole in conjunction with General Orders Cap. D can only mean that the appointment of the plaintiff is of such a temporary nature that it is subject to review every month. It does not mean that he is entitled to one month's work because at the time of his termination the plaintiff was entitled to three months' notice. If I accept the argument of both counsel it would mean that plaintiff is entitled to three months' salary. If that be the case then it negates the alternative method of termination by paying one month's salary in lieu of notice. At most the month-to-month provision means that where it is decided to terminate service by way of notice the period runs from the first day of the calendar month next following the service of the notice. Thus if the letter of November 19, 1966 had been a notice to terminate service instead of notification of termination, the three months' period would commence from December 1, 1966 and end on February 28, 1967. I therefore hold that the termination of service on November 19, 1966 was not wrongful dismissal and I further hold that the plaintiff was not entitled to salary for the remaining part of November 1966.

I would accordingly dismiss this action with costs.

Claim dismissed.

Solicitors: *Morris Edgar & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. CENTRAL SUGARS BHD.

[A.C.J. (Chang Min Tat F.J.)
January 20, July 19 & September 1, 1977]
[Kuala Lumpur — Tax Appeal No. 2 of 1976]

Revenue Law — Pioneer industry — Sugar production — 5-year period of tax exemption — Hedging — Whether taxable — Whether hedging is part of business of sugar refinery.

The tax payer enjoyed the status of pioneer industry during which time, January 1, 1968 to December 31, 1972 (5-year period) its profits were exempt from income tax. Revenue however sought to levy income tax on profits derived from hedging, an operation consisting of forward sales and purchases of raw sugar. The Special Commissioners were of the opinion that the taxpayer was neither speculating in the terminal sugar market nor was it engaged in activities amounting to a separate business. Hedging was necessary for the purpose of stabilising and lowering the costs of the raw sugar used by it in its production of refined sugar.

The question before the court was whether the Special Commissioners were right in law in coming to this decision on the facts as found by them.

Held: (1) the court will interfere only "if the case contains anything *ex facie* which is bad law and which bears upon the determination";

(2) the Special Commissioners were justified by the facts and evidence in arriving at the conclusion that the terminal transactions entered into by the taxpayer were not merely speculation but hedging operations which formed part of its business as sugar refiners.

Cases referred to:-

(1) *Edwards* v. *Bairstow & Harrison* [1956] A.C. 14 @ 36.

(2) *U.H.G.* v. *Director-General of Inland Revenue* [1974] 2 M.L.J. 33.

(3) *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* 49 D.T.C. 602 @ 604.

(4) *Reids Brewery Co. Ltd.* v. *Male* 3 T.C. 279 @ 284.

TAX APPEAL.

Datuk Eusoffe Chin (Senior Federal Counsel) and *Bakaruddin bin Sulaiman* (Federal Counsel) for the appellant.

J. Puthucheary for the respondent.

Chang Min Tat F.J.: By reason of the abandonment by Revenue of the challenge to the Special Commissioners' finding with respect to the value of the plant and machinery, the remaining issue before this court in the case stated is the determination by the Special Commissioners that

"The profits from terminal sugar transactions during the Taxpayer's tax relief period form part of the profits from its business of producing refined sugar."

The Taxpayer took over the business of the United Malay States Sugar Industries Limited as a going concern on October 15, 1965. On September 2, 1969, it was given a pioneer certificate in respect of its production of refined sugar, back-dated to January 1, 1968. The status expired on December 31, 1972. During this 5-year period, its profits were exempt from income tax. Revenue however sought to levy income tax on profits derived from an operation known in the business world as hedging which, briefly, consists of forward sales and purchases of raw sugar.